Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689.

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

PETITIONER'S PETITION FOR A REHEARING.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689.

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

PETITIONER'S PETITION FOR A REHEARING.

Now comes petitioner and respectfully prays that a rehearing be granted herein because:

The Court overlooked the consideration that an appellant in the Circuit Court of Appeals could not by a stipulation between counsel give said Circuit Court of Appeals jurisdiction to dispose of the case on a partial record of the evidence before the Trial Court. In *Bertke* v. *Hoffman*, 330 Mo. 584, l. c. 586, it is said:

> "Appellant's abstract of the record purports to give in about sixteen pages, chiefly in narrative form,

'all the evidence introduced in the entire case,' but it plainly shows that certain exhibits received in evidence have been omitted therefrom and even states that evidence was omitted therefrom because not 'pertinent to the points raised on this appeal.' It is for the court and not for appellant to determine whether the evidence is pertinent."

In *Stalcup* v. *Bolt*, 234 Mo. App. 1070, l. c. 1075, it is said:

"Although the record discloses a stipulation between counsel for plaintiff and defendant to the effect that the 'foregoing bill of exceptions is true and correct and contains all the evidence offered and introduced all the objections of counsel the rulings of the Court thereon * * *' an examination of the record discloses beyond the slightest doubt that parts of the evidence have been omitted from the abstract. For instance, none of plaintiff's testimony in chief appears in the abstract. The first line of plaintiff's evidence as set out in the abstract of the record, begins with the cross-examination of plaintiff. * * *. Even though the attorneys for the respective parties may have been of the opinion that the portion of the evidence abstracted, was all that had any direct hearing upon the questions raised in this appeal we cannot convict the trial court of error. * * * without an opportunity to determine for ourselves, from *all* the evidence whether or not the ruling was correct."

Also in *Maplegreen Realty Co.* v. *Trust Co.*, 237 Mo. l. c. 361, it is held:

"that appellate courts approach the facts in an equity case by allowing to the trial chancellor (in this case his referee) the primary advantage of a personal factor or equation, viz., the actual use of eye and ear in discerning the truth of witnesses (eye and ear filling a prime office in that regard), and in stamping testimony with its earned and deserved percentage of

> weight and credit. The upper may well defer to the lower court in that particular. Subject to that modification, an equity case is heard *de novo* on appeal. Therefore, if it cannot be heard *de novo* in all that term implies—*i. e.*, in very deed and truth—it should not be heard at all on appeal. * * * A court of conscience may, indeed, speak and act, but it must hear before it does either. Now to 'hear' and decide the merits of a case in equity, without the testimony, is a solecism."

It thus appears that an appellant cannot in Missouri give an appellate court jurisdiction to review the action of the trial court, either at law or in equity, by a record assertion with or without a stipulation of counsel to review the action of the trial court unless it includes all the evidence on the question to be reviewed.

The rule thus stated by the Missouri Appellate Courts was also announced by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Van Dusen,* 78 F. 2d 121, in which case the Court after citing decisions of the Ninth and Fourth Circuits and the decision of this Court in *Suydam* v. *Williamson et al.,* 20 How. 427, said (l. c. 122):

> "An appellate court must be controlled in its decision solely by the facts contained in the record. * * * In other words, deficiencies in the record may not be supplied by stipulations or statements of counsel or recitals in the opinion of the court from which the appeal is taken."

The Hon. Albert A. Ridge of the United States District Court bore the same relation to this case that the late Lord Bathurst bore to the case of *Sir John Eden, Bart., et al.* v. *The Right Honorable John Earl of Bute et al.,* VII Brown's Parliamentary Cases 204, 208, referred to on pages 7 to 10 of Petitioner's reply herein. The High Court of

Parliament held that a different record as to evidence could not be made for the appellate court because, if

> "on the hearing the appeal in this case from the Lord Chancellor's decree, the evidence on both sides was to be gone into, a case would be laid before the House, totally different from that which was before his Lordship."

Also this Court in the case of *Guaranty Trust Co.* v. *York*, 326 United States 99, held that (l. c. 104):

> "Congress provided that 'the forms and modes of proceedings in suits * * * of equity' would conform to the settled uses of courts of equity. Section 2 (May 8, 1792), 1 Stat. 275, 276, Ch. 36, 28 U. S. C. A. 723, 8 F. C. A., Title 28, 723. But this enactment gave the federal courts no power that they would not have had in any event when courts were given 'cognizance,' by the first Judiciary Act, of suits 'In equity.' From the beginning there has been a good deal of talk in the cases that federal equity is a separate legal system. And so it is, properly understood. The suits in equity of which the federal courts have had 'cognizance' ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery."

Had Judge Ridge's decision herein been rendered in the State Court, respondent could not on the record herein have had a trial *de novo* in any Missouri appellate court on the sole ground that a stipulation of counsel does not confer appellate jurisdiction when the record contradicts it.

This Court has held that a "substantive" or "procedural" State rule which in a state court would bar recovery by a litigant must be applied by the Federal Courts. This Court further said in *Guaranty Trust Co.* v. *York*, *supra* (108):

"Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."

Also since the Statute creating the circuit courts of appeal provided that such courts shall have appellate jurisdiction to review by appeal final decisions of the District Courts, but should have no original jurisdiction, it was, therefore, not the function of the Appellate Court in this case to assume the powers of the trial court. *Schilling* v. *Schwitzer Commission Co.*, 142 Fed. 82 (C. C. App. D. C.). Its function was wholly appellate. *Ins. Co.* v. *Nolty*, 130 F. 2d 675.

For the reasons above stated, Petitioner respectfully prays this Court for a rehearing in this cause.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Certificate of Good Faith.

We, Harvey E. Hartz and Martin J. O'Donnell, Counsel for Petitioner in this cause, do hereby state that the Petition for Rehearing in this cause is filed by us in good faith and not for delay and that we verily believe the same to be meritorious.

Harvey E. Hartz

Michael J. O'Donnell

Attorneys for Petitioner.